1950.

File No. S. Notices/50

Legal Department—

A BRANCH

Subject:— Papers relating to the notices of intended Suits.

(For subsequent papers please see Part II)

1.23 E

File No. S. Notices/50 Pt I

Gen. 194

7-A

C O N T E N T S.

Legal Department File Np. S. Notices / 50 I.

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Office of the R.L.A.

In his notice the Contractor has claimed Rs. 1120 as pay ofthestaff and cost of the tools plus 15 % of the estimated value of the contract. But in his letter dated 23rd May 1949 to the Executive Engineer, Mehsana, at page 9 ante, he had agreed not to charge for thetools andimplimants and stated that he would be satisfied if he is xx paid for (1) the cost of the work done by him (2) wages of labourers and other workmen actually employed by him (3) reasonable remuneration to kimx himself as he was occupied for nearly one month and (4) cost of certain materials utilised by him in execution of the work. These demands seem reasonable and the Public Works Department is therefore requested to consider whether it is not expedient to end this dispute and arrive at an aminable settlement with the Contractor by conceding thedemands made by him in his letter aforesaid.

P.M.Lad
3-1
Remembrancer of Legal Affairs.

U.R. P.W.D. No. 79 dated the 4th January 1950.

S.C. 21/6
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Submitted.

These two cases raise the same point for consideration and that is whether the price of the gunny bag is included in the price of the cement supplied by Govt. to Govt. contractors. The point has arisen in case of two contractors, Messrs. Gotadaki and Doddannavar and the latter has already given a notice of suit in the matter

Briefly the facts are these : It appears that the contractors were given contracts for construction of Lahore sheds in Belgaum Division and the usual agreements in Tender Form B.2 were executed. Cement was at that time difficult to obtain and in order to facilitate construction of the sheds, the Public Works Deptt. agreed to supply it to the contractors at the controlled rate. Regarding this supply a condition was inserted in Schedule A of the agreement which is in following terms:

" The cement will be charged at the rates at which the Department purchases plus all the incidental charges, incurred by the Department upto the place of delivery".

Supply was made according to this condition; but later as the contractors failed to deliver the empty gunny bags, the P.W.D. tried to deduct their price at Re. 0-8-0 per bag from the contractors' bills. The contractors, however, are not agreeable to this deduction. In case of Mr. Gotadake, it is his contention that there was no condition about return of bags in his contract and therefore he was not bound to return them. In case of

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Daddannavar, it appears that he has returned the bags but he is claiming their price from the Department. He has also threatened a suit if the price is not refunded.

The Secy, P.W.D. is inclined to agree with the contentions of the contractors (pp. 4 5) He states that price of cement includes the price of the gunny and that that is the trade practice. However, the R.L.A. is requested to advise in the matter.

The view taken by the Secy . P.W.D. is correct.

R.L.A.

P.M.Lad
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RTK.
2-2-50.

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It is not advisable to maintain a stiff ~~mx~~ attitude when the refusal of a license for possession and use of molasses was wrong and theorder of attachment cannot be supported. The molasses attached must have been disposed of. Without prejudice to Government's right to disown liability for attachment and refusal of the license , Government may offer the ~~salepmx~~ proceeds of the attached molesses to plaintiff intimating that thelicense for possession an use of molesses would be issued on paymentof the necesaary fees.

P.M.Lad
24-3

Remembrancer of Legal Affair

U,R. to R.D° No. 4169 dated the 25th March 1950

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If the Plaintiff's allegation that he was appointed by Government is true, no authority other than Government coulddismiss him from service. The papers os inquiry appear to have been lost. If the loss of the papers is proved and there may not be much difficulty in proving such loss - Secondary evidence wouldbe admissible under section 65 (c) of the Evidence Act. But such evidence must be direct i.e. of a person wh issued theshow cause notice and theorder of dismissal by order of Government or of a person who has actually seen the show cause notice and the order of dismissal issued by order of Government. If civil Supplies Department is able to produce such evidence the Plaintiff's suit wouldbe defensible.

P.M.Lad
27-3

Remembrancer of Legal Affairs.

U.R. to C.S.D. No. 206-Confl. dated the 27th March 1950.

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Office of the
Remembrancer of Legal Affairs.
Bombay Castle, (Bombay No. 1)
17th April 1950.

To

The Director of Agriculture,
Poona

Subject :- Notices under sec. 80 of the Civil Procedure Code.

Sir,

With reference to your letter No. EST/878 dated the 21st January 1950 on the above subject, I have the honour to observe as follows :-

Admittedly the claims made by the applicants relate to the supply of vegetables made during the period from January 1946 to March 1946. These claims are obviously time-barred.

Although the rates fixed by the Price Fixation Committee were not ipso facto bi ding on Government it appears that it would be making a discrimination between one set of vegetable growers and another set of vegetable growers if the rates given to the former are refused to the latter. Consequently the payment to the Sangamner and Jeur group of cultivators at the rates fixed by the Price Fixation Committee would amount to acceptance of those rat in respect of cultivators who have supplied vegetables under simi lar circumstances. Those rateswouldbe applicable to all the supplies made by bona fide registered growers. The reply to the first question wouldxk therefore be in the affirmative.

If any distinction isto be mde between genuine supplies, that is to say, the supplies out of theproduce of the registered areas, and non genuine supplies, i.e. supplies out of theprodu of the registered areas supplemented with the purchases made fr themarket- and it appears that according to the Director of Agriculture this distinction can be made- the claimants would c tainly be entitled to the rates in respect of such portions of their supplies which were commensurate with their respective registered area, although the rates in respect of the rest of, supplies may be equal to themarket rates. The reply to the sec question also is in the affirmate.

A.L.R.

R.T.K. 15-4

R.L.A.

Sd/- 14-4

Yours faithfully

P.M.Lad

Remembrancer of Legal Affairs.

Office of the R.L.A.

Statement of the Case.

A theatre known as Ramkrishna Theatre, at Manmad was requisitioned by Government of Bombay under Rule 75(A) of the Defence of India Rules in June 1944 for the purpose of storing foodgrains. The said Theatre was damaged by fire which broke out in the premises on 22nd May 1946. Inquiries into the cause of the fire were made by the local officers and a report was submitted to the Civil Supplies Department by the District Magistrate on 7th August 1946. In the report it was stated that the ~~K~~ Police inquiry revealed that the fire broke out as a result of a half burnt bidi not extinguished having been thrown in the godown premises by someone through carelessness . The services of the Taluka Godown Manager and the Godown Manager, Manmad have therefore been dispensed with". On receipt of the above report the Civil Supplies Department took the view that the fire was accidental and Government was not liable to pay any compensat on to the owner for the damage. A number ofrepresentations were made by the owner of the theatre for settlement of his claim and finally on 20th May 1949 a notice under section 80 of the Civil Procedure Code 1908 was served on Government claiming Rs. 80,000/- as compensation. In the said notice theowner f of the theatre contends as follows :-

(1) Under clause 3 of the Requisitioning Order Government was bound to restore to the owner the requisitioned building as far as possible in the same condition in which it was on the date of requisition. Consequently no matter by ~~whom~~ whom or how the fire was caused Governmen is bound t restore the requisitioned building to the owner in the same condition in which it was requisitioned that is to say, to e liable to pay compensation necessary for the re-erection of thebuilding.

(2) Some interested persons or mischief-makers set fire to the building and thereby the building was destroyed.

(3) The said fire took place by negligence. Government.

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kept highly combustible material in the said premises without taking a y care to protect the premises against fire.

The first contention is covered by R.L.A.'s opinion No. 4575 dated 29-6-1944 where it was held that unless there was negligence Government would not be liable to pay compensation for the loss caused to the requisitioned building by fire. That is to say if fire was caused by vis major to the requisitioned building Government would not be liable. Consequently the contention that Government being bound to restore the requisitioned building in the same condition in which it was at the time of its requisition was liable to pay compensation fufficient for its re-erection would not be tenable.

There is absolutely nothing to prove that fire was caused voluntarily by any interested or mischievous person. In this connection attention is invited to Mamlatdar's report of 4-6-1946 where he was considered this aspect and has come to the conclusion that about 4 days before the fire occurred the books of accounts and x cash were examined and found to be correct and consequently there was no reason for the godown manager or any one concerned with the management of the godown to set fire to the godown to conceal fraud, if any, committed by them. The third contention is incon istent with the second contention and cannot be reconciled. Prima facie the grains stored in the godown were not liable to spontaneous combustion. In East India Distilleries and Factories vs. Mathias 51 Mad. 994 it was held that proof alcohol was not apparently liable to spontaneous combustion under any circumstances. If proof alcohol was not combustible, much less could grains be liable to spontaneous combustion. Consequently this contention also is hardly tenable. If a lighted half burnt bidi is the real cause of fire the question for consideration would be whether the throwing of such bidi would amount to negligence. "Negligence" means an ommission which a reasonable man guided upon those considerations which ordinarily regulate the conduct of a human affairs would do or doing something which he would not do". In

21/6 Heaven vs. Pender 1883 11 Queens Bench Division p. 503 Lord

Esher laid down the following rules "Whenever one person is by circumstances placed in such a/ position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to this circumstance he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid su ch danger" . Applying these principles to the facts of the present case it is admitted that a huge quantity of grains was stocked in the godown. Any man of ordinary prodence would certainly realise that it would be dangerous to throw a lighted half-burnt bidi in the a godown where such grains were stocked. Although materials are not quite sufficient to trace definitely the cause of the fire, if what is stated by thepolice is true- and it may not be possible to contradict it- it is likely that the court may hold that there was negligence on the part of the Government servant in charge of the godown. This point has not been alleged in the notice although it is vaguely suggested that there was negligence in not taking proper care to protect the godown against fire when combustible articles were stored in the godown. If negligence on the part of a Government servant is proved and a parently it was so according to the police report - it would be difficult for Government to escape liability for compensation.

In view of the heavy claim involved, the advocate General is requested to advise.

P.M.Lad

5-1

Remembrancer of Legal Affairs.

U.R. to the Advocate General ,Bombay, No , 210 dated the 6th January 1950.

S.C. 21/6

No. 7/50.

Advocate General's Chambers,
High Court.
Bombay, the 3rd May 1950.

U.C.R. to the Advocate General of Bombay.

No. 210, dated the 6th January 1950.

O P I N I O N.

In this case the solicitors' notice of the 20th May 1949 puts forward two claims on behalf of the owner of the theatre which was destroyed by fire on the 21st of May 1946 while under requisition. The first claim is for Rs. 80,000/- in respect of the loss of the building, and the second is for Rs. 1,215/- being the amount of the rent for the period from 23rd January 1947 to 26th August 1947.

It appears that after requisitioning, Government was using the place as a godown for storing grain. The Police report attributes the cause of fire to an unextinguished bidi having been thrown inside the building. It would appear also that there was no reason or cause for anyone to have deliberately attempted to set the building on fire. The Government officers in dealing with the claim for compensation for the loss of the building were guided by the opinion of the R.L.A. No. 4575 dated the 28th of June 1944 and the observations made therein. But in my opinion, that opinion and those observations are really not relevant to the case. They dealth with a different set of facts, i.e. the destruction of the building by explosion and the consequences arising therefrom. The R.L.A. rightly relied upon the doctrine of vis major or Act of God as relieving Government from liability to the owners of the destroyed premises. The observations regarding negligence in that opinion cannot be read divorced from their context, and the position in this case has to be dealth with quite independently of them.

By reason of clause (3) of the Requisitioning

Order, Government was bound to restore to the owner the requisitioned building, as far as possible, in the same condition as it was on the date of the requisition. It seems to me that apart from any contributory act which could be laid at the door of the owner himself, or any act of God or ~~the~~ vis major, the obligation contained in that clause must be fulfilled. If the building was destroyed by the negligence of any one while in the possession and control of Government, the liability falls on Government to make good the loss. There was, it seems to me, an obligation to use the building in the way which should be used by an ordinary prudent person, and there was a duty upon the Government to take every precaution against the negligence of its servants. I am unable to see how the claim for damages can be resisted, though, it may be that the ~~xxx~~ quantum of damages can well be challenged . The Executive Engineer has estimated the amount of compensation at Rs. 40,000/- on the basis of the cost of reconstruction taking the basic cost in 1938-38 as nearly Rs. 19,000/- when the building was actually constructed, and adjusting the figure to 150% rise above the 1937-38 price. The owner has added apparently 300% accounting for the considerable difference. The Ascertaining of damages is a pure question of fact which may have to be determined if the parties agree, by the valuation of an independent architect. I am inclined to think that the true figure is somewhere between the two However, it is not for me to express any final opinion on the valuation itself.

As regards the second item of claim, the owner is clearly entitled to rent or compensation upto the 26th of July 1947 when Government was in a position to give up possession. The delay that took place in taking possession after the 26th ~~x~~ July was due to the owner.

In view of the notice under section 80, I suggest that Government may make an offer to have the amount of compensation adjusted in a proper manner by some

independent authority, such an offer should be made without prejudice.

Sd.

Advocate General.

S.C. 21/6

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Office of the R.L.A.

A copy of the opinion of the Advocate General, Bombay, No. 7 of 1950, together with the statement of the Case prepared for him is forwarded herewith. The Civil Supplies Department is requested to take further action in the matter in the light of the opinion (Cf. Rule 114(2) of the Law Officers' Rules).

P.L.Lad
1-6

Remembrancer of Legal Affairs.

U.O. to C.S.D. No., 7443 dated the 1st June 1950.

S..C. .21/6

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The landlord is under an obligation to carry out the repairs of the premises and it was at his instance that the premises were vacated. Consequently, Government would not be liable to pay rent for the period subsequent to the vacation of the premises. In addition, Government would be entitled to claim damages for the failure of the landlord to carry out the repairs in time. Government may, therefore, reply to the notice given by the landlord that Government would not only be not liable to pay rent, but would be entitled to claim damages for the landlord's failure to carry out the repairs in time. Government would also be entitled to recover rent paid to him after the premises were vacated, which payment was made under a misapprehension of law.

P.M.Lad
16-7

Remembrancer of Legal Affairs.

U.R. to C.S.D. No. 10072 , dated the 18th July 1950.

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On a persual of the notice of suit given by the Constractor and the statement of the case prepared by the Electrical Commissioner and the correspondence underlying them, it appears that the claim of the Contractor for compensation is based mainly on the ground that there was abnormal delay in giving the final design for foundations and by the time it was so given the stipulated period for executing the work had already expired and since he (Contra tor) did not apply for an extension of time he was released from his contractual obligation and consequently he was not bound to pay the difference between the contract rate and the amount required for the completion of the work as provided in clause 3 of the Contract.

2. It is true that the contract was executed some time in March 1947, and the stipulated period for completing the work was only four months. But there were certain difficulties in the way and by mutual agreement between the Electrical Commr. and the Contractor it was agreed that the contract period of four months should count from the 1st October 1947. The contractor started excavation of foundations in October 1947 and found the soil conditions poor. There were also other points in the design affected by those and other factors which appeared to need attention and an inspection of the site towards the end of November 1947 showed that modifications in the designs were needed to assure the safety of the structures. The bearing capacities of the soil were poor and the ~~ex~~ crushing strength of the stone low; the modified design needed complicated calculations and detailed drawings the latter amounting to over 30 in number. The review of the design taken urgently in hand in the first week of December 1947 in order to expedite the work and obtain a safe and econo design advice and help were obtained from the expert Engineers. of the Concrete Association of India, and the final lining out for foundations was given between the 8

and 10th of January 1948. The contractor was X all the while kept informed of the progress of the work and from time to time he had discussions with the Officers of the Electrical Department. He was also fully aware of the fact that the review was being done in consultation with the experts of the concrete Association of India and had knowledge of the kind of modifications being made and the inevitability thereof.

3. It is true that by the time the lining out was given nearly the three months of the contract period had expired and the Contractor had about a month more to finish the work and that period was hardly sufficient. But the contractor though repeatedly requested to begin the work in right earnest and, if necessary, to ask for extension of time, he did not do so and on some pretext or other he went on carrying on correspondence urging that the prices had gone up and the changes in the designs were sweeping with the result that there was a complete change not quite in x conformity with the specifications for which he had tendered. Although the contractor was assured that Government would be moved to consider his case sympathetically for some compensations on account of the rise in prices the Contractor would not budge an inch and finally decided to abandon the work. The main question for consideration would, therefore, be : whether the delay in lining out the structures would relieve the Contractor of the contractual liability to execute the work.

4. The legal position in this respect is considered in Halsbury's Law of England (2nd Edn. Vol. III pp. 280-81) where it is stated : "There are many ways in which the completion of the works by the contract time may be prevented by the act or default of the employer as for instance, by ordering extras or not providing the site at the proper time, failure to supply drawings etc., or failure to supply building materials which the employer has agreed to supply. Where the effect of extras being ordered by the employer is to

delay

delay the contractor, it is clear that in the absence of special stipulations in the contract the date fixed for completion is made inapplicable and the contractor relieved from his liability to pay liquidated damages for daix delay. The onus lies on the contractor to prove that the delay was, in fact, caused by some act or omission of the employer. The cases xinx relating to release from the obligation to pay liquidated damages for delay in consequence of some delay caused by the employer seem to fall into three classes :-

(1) where the power to extend the time has been properly exercised; and

(2) where g there was such a power but it has not been properl exercised ; and

(3) where there was no such power.

In the first class of cases the power of extension must have been exercised by the person designated within the time which the contract either expressly or impliedly limits for that purpose in the manner and for the events stipulated in the contract. Ordinarily, the proper time for allowing an extension is when the event happens on which the extensi depends. If, for example, extras are ordered which must delay the work and extension of time should be madexs before the time when the delay is caused thereby for the effect o delay caused by such an order would be to set the time at large, at any rate, for the time being and it might be permanently, and when this delay has once occurred the Architect or Engineer might, apart from the express provisi in the contract, have then no power to extend the time so as to preserve the contractor's obligations to pay liquidate damages etc. The other two sxls classes where there is power t to extend but such power has not been exercised and where there is no power to extend may be considered together. In either of these cases the effect of delay caused by the employer is to set the time at large and exonerate the build from liquidated damages for delay, the general rule of law being that the performance of a condition is excused by

on the part of theobliger. The onus of proof of such obstruction lies on the ~~xxx~~ obliger. Where, however, the contractor has undertaken to do the ~~x~~ specified work together with any extras that may be ordered within the specified time he has by this undertaking expressly deprived himself of the protection of the rule so far as concerns the ordering of the extras."

5. Under clause 2 of the Contract the time laid down for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence the work is given to the contractor, and the failure to abide by the programme of detailed progress laid down by the Executive Engineer would make the contractor liable to compensation as specified therein.

Clause 6 provides that, " if the contractor ~~x~~ shall desire an extension of time for completion of the work on the ground of his having unavoidably hindered in its execution or on any other groumd he shall apply in writing to the Executive Engineer within 30 days from the day on which he was hindered as aforesaid or on which the cause for asking extension occurred and the Executive Engineer may, if in his opinion there are reasonable grounds for granting an extension, grant ~~x~~ such extension as he thinks necessary or ~~xx~~ proper.

Under clause 14 "the time limit for the completion of the work shall be extended in the proportion that the increase in the cost occasioned by alterations or additions bears to the cost of the original contract work and the certificate of the Engineer-in-charge as to such propertion shall be conclusive."

6. It is clear from these provisions that on the ground that there were alterations in the designs and there was also delay in giving the final lining out, the contractor could have asked for an extension of time and the Executive Engineer would certainly have granted such extension. But

the

the contractor assumed a militant attitude and wanted to back-out of the contract with a view to saving himself from the liability to construct the works probably at a loss owing to the rise in prices. Even if he had failed to ask for an extension of time he would certainly have been entitled to be relieved from the obligation be complete the work within the stipulated time. According to the conditions of the contract the failure to carry out the work ~~xik~~ within the stipulated period would make the contractor liable to pay compensation. On the ground that there was some delay in showing the lining he would certainly have been entitled to claim exemption from payment of such compensation, but there is absolutely no provision in the contract to relieve him on such ground from the liability to execute the work. ~~Xx~~ Besides, the contractor was well aware of the urgency of material changes to be made in the designs in view of the poor soil of the foundations, and consequently the delay was in no way wilful. Even after the lining out of the structures in the first work of January 1948, the Contractor proceeded with the foundation work and requested the Engineer to inspect and allow him to proceed with the further structures. This circumstance would clearly indicate that the delay in lining out the structures was not the main reason for abandoning the work but the real reason was that the prices had risen considerably and the execution of the work would involve him in heavy loss. It may also be noted that till the middle of January or the end of January 1948, the contractor was not ready with the requisite materials to proceed with the work. He had not sufficient supply of cement and steel without which he could not execute the work even if the lining out of the structures was done long before. In the circumstances, it appears clear that the plea about the delay in lining out the structures is merely an excuse for getting out of the contractual liability.

7. It appears that the contractor did abandon the work mut and consequently the Executive Engineer was perfectly justified in taking over the work and getting it executed under clauses 3 and 5 of the contract. Under these clauses the work could be carried out with the help of any sh other agency at the expenses of the contractor and the additional expenses recovered from him. The additional expenses thus incurred for completing the works amount to Rs. 20968 which the contractor is clearly liable to reimburse. His security deposit is also liable to be ~~forfeix~~ forfeited under these clauses. It appears, therefore, that there is no inherent weakness in Government's case and in all probability Government is likely to succeed in Court. From the legal point of view compromise does not seem expedient.

P.M.Lad
21-7

Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 10488 , dated the 25th July 1950.

S.C. 22/6

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ice of suit pension and rest thereon.

sions Act, 1871.

Dr. Surjavanshi's threat to file a suit for recovery of pension andinterest thereon is without substance. No such suit for pension can be entertained by a civil Court without a certificate from the Collector under section 4 read with section 6 of the Pensions Act, 1871 (see Sarat Chand Das V. Secretary of State, I.L.R. 38 Cal. 378), and the question of claiming interest would not arise. Besides in view of the decision in Bengal Nagpur Railway v. Ratanji (1938) 2 Cal. 72, it appears that the plaintiff will not be entitled to any interest for the period prior to the date of the suit.

P.M.Lad

Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.W.D. No. 578-Confl. dated 1st August 1950

S.C. 22/6

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